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INJURY TO GOODS BY ACT OF GOD DURING DELAY BY CARRIER.

Where a carrier negligently delays a shipment of goods, during which time the goods are injured or destroyed by an act of God which would not have injured or destroyed them, except for the delay, is the carrier liable for the injury or destruction?

While it is not new, this question is one upon which there is a decided conflict of authority, the conflict beginning with Morrison *v.* Davis, 20 Pa. 171, 57 Am. Dec. 695, and Denny *v.* Railroad, 13 Gray (Mass.) 486, 74 Am. Dec. 645, holding the carrier excused from liability, and, on the other hand, Michaels *v.* Railroad, 30 N. Y. 630, 86 Am. Dec. 426, holding the carrier liable. That these decisions are diametrically opposite conclusions from the same state of facts, and therefore impossible of being reconciled or distinguished, is demonstrated by the Massachusetts and New York cases arising from the destruction of goods by the same flood. A number of cases in the middle Western States arose from the flood of the Mississippi in 1903. The decisions in the different states are about equally divided between these two holdings, though there may be a slight preponderance of authority in favor of the Pennsylvania and Massachusetts holdings, not enough, however, to weaken the force of the decisions contra.

The irreconcilable conflict in the authorities is recognized by text-writers. The rule announced in the Pennsylvania and Massachusetts cases is supported by 1 Thompson, Negligence, § 74; Schouler, Bailments, Ed. 1905, § 348; Hale, Bailments and Carriers, 361; 6 Cyc. 382; note in 36 Am. St. Rep. 838; but other authorities prefer the New York rule, Hutchinson, Carriers [2d Ed.], § 200; Ray, Negligence of Imposed Duties, 177. The supreme court of the United States in Railroads *v.* Reeves, 10 Wall. 176, followed the ruling of the Pennsylvania

and Massachusetts courts, saying, "Of the soundness of this principle we are entirely convinced." The court made no mention of any cases other than Morrison *v.* Davis and Denny *v.* Railroad. It is proper to mention, that this is a subject upon which the decisions of the state courts are not binding upon the federal courts.

Virginia follows the Pennsylvania and Massachusetts ruling. In Herring *v.* Railway, 101 Va. 778, it was said that a carrier, though guilty of negligent delay in transporting live stock, is not liable for injury thereto inflicted by severe cold weather which overtook them in transit in consequence of the delay. The severe weather, and not the delay, was held the proximate cause. The court quoted from Fowlkes *v.* Railroad, 96 Va. 742: "A man guilty of negligence is not responsible for all the consequences that may or do flow therefrom, but only for such consequences as a prudent and experienced man, fully acquainted with all the circumstances which in fact exist at the moment, could have foreseen or reasonably anticipated."

While West Virginia may not be said to follow absolutely the New York ruling, McGraw *v.* Railroad, 18 W. Va. 361, which holds the railroad company liable for injury to potatoes by freezing during delayed shipment, is in conflict with the Virginia case. Any attempt to distinguish the two cases is frustrated by the fact that, by the reasoning in the West Virginia case, the conclusion is reached that live-stock and vegetables are articles subject to injury under similar circumstances and which would not injure such articles as iron or wood. This case also holds that freezing weather during the month of February is a consequence to be foreseen by the carrier.

Carrier as Insurer.

A carrier assumes all risks except those caused by an act of God or the public enemy, or the inherent defects of the goods or the act of the owner thereof, and when it is shown that the injury to or the destruction of the goods resulted from such causes the carrier is excused from liability. "A common carrier is protected from liability for the loss of property intrusted to it for transportation only when it is made to appear that the loss was occasioned by the act of God, or the public enemy, or

where the loss or damage results from some inherent quality or infirmity in the property itself. Against losses from all other causes the carrier is an insurer." Railway Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191, 18 L. R. A. 323, 18 Am. St. Rep. 45.

But as to the prompt shipment and delivery of goods the carrier is not an insurer, but is held to the exercise of only ordinary care. The carrier's only liability for delay arises from negligence. "For delay in receiving and carrying the goods, the carrier is not an insurer, and is bound only by the general rule of liability for a breach of his contract, or of his public duty as a carrier." Pittsburgh, etc., R. Co. *v.* Hollowell, 65 Ind. 189; Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 8 L. R. A. 322, 326. As delay does not come within the general rule, it does not come within the exception.

Liability as for Deviation.

Is the carrier's liability where the goods are injured or destroyed during delay analogous to the case where they are injured or destroyed during a deviation from the usual course of carriage? Certainly no reason can be assigned for a distinction between the two cases. The carrier's liability should be the same for his placing the goods in the time of the inevitable accident as for his placing them in the place of such accident. "There would seem to be no good reason why, if the loss can be traced with any certainty to the fault of unreasonable delay, the carrier should not be held responsible for it in the same manner as he would be for the fault of an unnecessary deviation." Hutchinson on Carriers, § 308. "The analogy to the case of a deviation is denied in the cases which announce the rule of the Pennsylvania and Massachusetts cases but the distinction attempted to be made that a deviation amounts to a conversion rendering the carrier absolutely liable is too technical to be considered as persuasive. The analogy between the two classes of cases has been recognized in Constable *v.* National Steamship Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903, and in Hutchison, Carriers (2d Ed.), § 200." Green-Wheeler Shoe Co. *v.* Chicago, etc., Ry. Co. (Iowa), 106 N. W. 498, 500.

However, the Pennsylvania and Massachusetts decisions and those following them hold the carrier liable for deviation but

excuse him from liability for delay. The deviation is held to amount to a conversion while delay is not. A carrier ships goods from Washington destined for Richmond. Instead of shipping by the usual route by way of Fredericksburg, it ships by Lynchburg. A storm, which would have injured the goods although shipped by Fredericksburg, overtakes them in Lynchburg. The carrier is liable. But if the carrier delays shipment, when timely shipment would have avoided the storm, and the goods are injured during the delay, the carrier is not liable. The New York case and those following it necessarily recognize an analogy.

If the carrier deviate without necessity from the regular and usual course, the carrier is responsible for loss which may occur, whether by the act of God or from any other cause. The leading case on this subject is Davis *v.* Garrett, 6 Bing. (Eng.) 716, quoted extensively in Hutchinson on Carriers (3d Ed.), § 295, in which the plaintiff shipped by the defendant's vessel a quantity of lime, which was lost during deviation of the vessel from the usual and customary course between the point of shipment and the place of destination; to which the defense imposed was that the deviation by the master was not a cause for the loss sufficiently proximate to entitle the plaintiff to recover, inasmuch as the loss might have been occasioned by the same tempest if the vessel had proceeded in her usual course; but it was answered that no wrongdoer can be allowed to apportion or qualify his wrong; and that as the loss had actually happened while the wrongful act was in operation and force, the carrier cannot set up as an answer the bare possibility of a loss if his wrongful act had never been done.

There seems to be no conflict as to the carrier's liability in case of destruction of the goods during the deviation. This is a law of carriers and not of tort. The doctrine of proximate cause is not given application. In other words, the carrier is not excused under a strict application of proximate cause, independent of the law of carriers.

Proximate Cause.

"If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some inter-

vening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety. To the proximate cause we may usually trace consequences with some degree of assurance; but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile." Cooley on Torts (2d Ed.), p. 73.

The Pennsylvania and Massachusetts decisions declare the case within this rule and excuse the shipper. If a carrier is guilty of negligent delay in the transportation or delivery of goods intrusted to it, and a new cause intervening between such negligence and the injury complained of, which new cause is not a consequence of the original negligence, which reasonable prudence on the part of the original wrongdoer could not have anticipated, and but for which the injury could not have happened, the new cause is the proximate cause and the original negligence is disregarded as not affecting the final result. Rodgers *v.* Missouri Pacific Ry. Co., 75 Kan. 222, 88 Pac. 885, 121 Am. St. Rep. 416.

The New York ruling is that the negligence and unreasonable delay is such a proximate or concurring cause as renders a carrier liable. Bibb Broom Corn Co. *v.* Atchison, etc., Ry. Co. (Minn.), 102 N. W. 709. The carrier's negligence is a continuing active cause. Railroad *v.* Elliott, 150 Ala. 381, 43 So. 738. These cases refuse to excuse the carrier from liability where there is any human agency which concurs with the act of God. There must be an entire exclusion of human agency. Michaels *v.* Railroad (N. Y.), 86 Am. Dec. 415.

Foreseen Consequences.

"The real difficulty seems to be in determining to what extent, if at all, it is necessary that the negligent party must have been able to foresee and anticipate the result of his negligent act in

order to render him liable for the consequences thereof resulting from a concurrence of his negligence and another cause for which he is not responsible." Green-Wheeler Shoe Co. *v.* Chicago, etc., Ry. Co. (Iowa), 106 N. W. 498.

The Pennsylvania and Massachusetts cases in addition to declaring the negligence of the carrier not the proximate cause go further and assert that the injury or destruction of the goods is not a consequence of the carrier's negligence naturally to be foreseen and guarded against. As stated above, the Virginia case is very orthodox in its following of this doctrine of tort liability. The carrier is held liable only for such consequences as a prudent and experienced man, fully acquainted with all the circumstances, could have foreseen or reasonably anticipated.

On the other hand there are cases which hold the act of God need not have been foreseen. "A common carrier is liable to the owner of goods delivered to him for transportation, which are damaged or destroyed by an act of God while in his possession, in consequence of a negligent delay in forwarding them, whether the act of God could reasonably have been anticipated or not." Bibb Broom Corn Co. *v.* Atchison, etc., Ry. Co. (Minn.), 69 L. R. A. 509, 510. "In an action on contract the party who is at fault is only liable for such consequences as arise according to the usual course of things from his breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time the contract was made as the probable result of the breach. Hadley *v.* Baxendale, 9 Exch. 341; Sedgwick, Elements of Damage, 17. But in an action for tort, and the present action is of that character, recovery is not limited to the consequences within the contemplation of the parties or either of them, but includes all the consequences 'resulting by ordinary natural sequence, whether foreseen by the wrongdoer or not, provided that the operation of the cause of action is not interrupted by the intervention of an independent agent, or overpowering force, and that but for the operation of the cause of action the consequence would not have ensued.' Sedgwick, Elements of Damage, § 54. It is true that for the purpose of determining whether the injury suffered by the party complaining was the natural and probable result of the wrong

complained of a convenient test is to consider whether in general such a result might have been foreseen as the consequence of the wrong, but it is not necessary 'that the injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been the natural and probable consequence.'" Green-Wheeler Shoe Co. *v.* Chicago, etc., Ry. Co. (Iowa), 106 N. W. 498, 499.

"Now, while it is true that defendant could not have anticipated this particular flood and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, yet it is now apparent that such delay did subject the goods to the danger, and that but for the delay they would not have been destroyed; and defendant should have foreseen, as any reasonable person could foresee, that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper. This consideration that the peril of accidental destruction is enhanced by the negligent extension of time during which the goods must remain in the carrier's control and out of the control of the owner, and during which some casualty may overtake them, has not, we think, been given sufficient consideration in the cases in which the carrier has been held not responsible for a loss for which he is not primarily liable, but which has overtaken the goods as a consequence of the preceding delay in their transportation." Green-Wheeler Shoe Co. *v.* Chicago, etc., Ry. Co. (Iowa), 106 N. W. 498, 500.

Even in those courts which hold the carrier liable only for the consequences naturally to be foreseen, the Pennsylvania and Massachusetts cases, the rule stated in the above case should be at least persuasive. The courts should hold a carrier, guilty of negligent delay, liable for the exercise of a higher degree of foresight than that of an ordinary wrongdoer. This should be because of the relation of the parties and the duty of the carrier.

PERISHABLE PROPERTY.

"The authorities are not at variance where the property damaged is perishable, or inherently susceptible to damage from

climatic influences, as sudden changes in the weather. Changes in the weather are conditions which the carrier is bound to anticipate as likely to occur, and for injuries resulting to perishable goods from such causes the carrier is liable where his negligent delay in forwarding them contributes to cause the injury. Goods in this class are those likely to be damaged by freezing or from excessive heat. The authorities are at variance, in so far as negligent delay is concerned, only in cases involving property not perishable." Bibb Broom Corn Co. *v.* Atchison, etc., Ry. Co. (Minn.), 69 L. R. A. 509, 511.

Natural Justice.

The injury or loss is one of those unfortunate circumstances in which one party must suffer to no one's benefit. The law must determine which. According to natural justice, should the carrier or shipper suffer? If the act of God and not the delay be considered the sole proximate cause, the parties are equally free from fault, and therefore the Pennsylvania rule holds the owner must suffer, and yet the Virginia case works a hardship. But who should bear the loss when the responsibility and duty of the carrier is taken into account? Carriers enjoy peculiar privileges and are burdened with peculiar duties, the ultimate object of which is for the benefit of the general shipping and traveling public. At the present day carriers exist, at least in law and theory, not for their own benefit and profit-making, but for the necessity and convenience of the public. One duty, the performance of which is of much consequence to the general public, is dispatch; and, if in violation of this duty the carrier even remotely though actively causes the injury or loss, is it not of the parties the one that should bear the loss, especially as the relation of carrier and shipper now exists?

A Law of Carriers.

The Pennsylvania and Massachusetts cases decide this point by the simple application of certain principles of that body of rules constituting the law of torts generally. Whether the law holds the carrier liable or excused, would it not be more in harmony with the progress and advancement of the importance of carriers to apply a rule peculiar to carriers than to be bound

by a rule of torts which certainly had its inception in the case of persons standing on an equal footing as well as equally free from fault?

At the present day, there is a mass of law in the reported cases, text-books and encyclopedias on the subject of carriers. There is also much legislation. Congress has seen fit by virtue of the power to regulate interstate commerce to enact the Interstate Commerce Act, which relates exclusively to carriers. The state legislatures have also gone extensively into this field of legislation. There is therefore an extensive body of laws relating to carriers, and which should be treated as the law of carriers, and as a distinctive and important branch of the law generally, not subordinate to the law of torts. The law of torts is a general rule, while the law of carriers is one of special application, and when a general rule and one of such special application conflict, the latter should prevail. Therefore, it is unfortunate that the Pennsylvania and Massachusetts cases, while they may be correct in the ultimate decision reached, do not treat this question as one peculiarly of the law of carriers. It may be asked, Have these courts kept abreast of the times and the growth of the business and duties of carriers?

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